

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Plaintiff Victor Mature Davis appeals the decision by Carolyn Colvin, Acting Commissioner of Social Security, denying him Social Security benefits.¹ Davis moves for summary judgment or remand.² The Commissioner opposes the motion and cross-moves for summary judgment.³ The matter was submitted without oral argument pursuant to Civ. L.R. 16-5.

¹ The challenged decision was rendered by Administrative Law Judge Christopher Inama on August 2, 2012. The ALJ's decision became final on September 4, 2013, when the Appeals Council of the Social Security Administration denied Davis's request for administrative review of the decision.

² See Docket No. 15 at 1.

³ See Docket No. 19 at 1.

1 Having reviewed the papers and considered the arguments of counsel, the court DENIES Davis'
2 motion for summary judgment or remand and GRANTS the Commissioner's cross-motion for
3 summary judgment.

4 **I. BACKGROUND⁴**

5 Davis was born April 19, 1957.⁵ He has a high school education⁶ and has worked as a
6 roofer, laborer, driver, street maintainer and warehouse assistant.⁷ In June 2008, Davis strained his
7 right arm, lower back and knees while lifting a box at work.⁸ In July and August 2008, he
8 underwent testing and physical therapy, which showed mostly normal results with the exception of
9 tenderness of the back and knees.⁹ At that time, his treating physician, Dr. Abeles, limited him to
10 light work, including no lifting, pushing or pulling greater than 20 pounds and no repetitive
11 bending, twisting or stooping.¹⁰

12 In January and May 2009, physical examinations conducted in connection with Davis'
13 worker's compensation claim revealed no obvious back problems aside from a decrease in range of
14 motion to 70 percent of normal.¹¹ He had full range of motion of both shoulders and both knees

15
16
17
18 ⁴ All facts for this section are taken from the decision by the ALJ and the accompanying
19 administrative record.

20 ⁵ See AR at 97.

21 ⁶ See *id.* at 56.

22 ⁷ See *id.* at 181.

23 ⁸ See *id.* at 254.

24 ⁹ See *id.* at 270.

25 ¹⁰ See *id.* at 403.

26 ¹¹ See *id.* at 401.

1 but pain in the right shoulder and weakness with external rotation.¹² In January 2009 Abeles
2 relaxed Davis' work restrictions to allow him to lift, push and pull up to 40 pounds.¹³

3 In September 2009, MRIs revealed no acute lower back problems but showed labial and
4 rotator cuff tears in Davis' right shoulder.¹⁴ Abeles further relaxed Davis' work restrictions to no
5 lifting, pushing or pulling greater than 50 pounds.¹⁵ Abeles also authorized right shoulder surgery,
6 which was denied by Davis' workman's compensation program in April 2010.¹⁶ Abeles again
7 recommended shoulder surgery, noting that Davis had failed all conservative treatment options.¹⁷
8 In September 2010, Davis elected not to further pursue the shoulder surgery and remained limited
9 to no lifting, pushing, or pulling greater than 50 pounds.¹⁸

10 Then, in June 2010, Abeles completed a physical capacities statement in connection with
11 Davis' disability insurance application in which he noted severe physical limitations. Abeles stated
12 that Davis could stand for only five minutes at a time due to knee pain, sit upright for only ten
13 minutes at a time due to back pain, rarely lift less than ten pounds, work for less than two hours of
14 an eight hour workday, miss more than four days of work per month and require more than the
15 usual three workday breaks.¹⁹ Abeles also stated that Davis suffered from pain severe enough to
16
17
18

19 ¹² *See id.*

20 ¹³ *See id.* at 403.

21 ¹⁴ *See id.* at 405–410.

22 ¹⁵ *See id.* at 353.

23 ¹⁶ *See id.*

24 ¹⁷ *See id.* at 323.

25 ¹⁸ *See id.* at 309.

26 ¹⁹ *See id.* at 451–457.

1 interfere with his work capacity for two-thirds of an eight-hour workday.²⁰ The doctor also limited
2 Davis' pushing, pulling, handling and fingering ability.²¹

3 Davis first applied for Title II disability insurance benefits on June 1, 2011,²² claiming a
4 period of disability from an alleged onset date of December 31, 2008²³ through a "date last
5 insured" for Title II disability benefits²⁴ of June 30, 2010.²⁵ Davis alleges that his work-related
6 injuries, along with tinnitus and auditory hallucinations, limited his ability to work from 2009–
7 2010.²⁶ In June 2011, the state agency reviewing physician, Dr. Jaituni, reviewed the relevant
8 medical evidence and opined that Davis could lift and carry from 25 to 50 pounds, stand, sit and
9 walk six of eight hours in the workday, was limited in reaching overhead with his right arm and
10 also limited in crawling, crouching and climbing.²⁷ Davis' claim was first denied on August 11,
11 2011 and again upon reconsideration on November 8, 2011.²⁸ Davis then requested and was
12 granted a hearing before an ALJ.²⁹

13

14²⁰ *See id.*

15²¹ *See id.* The doctor did not state a reason for the difference in limitations between this report and
16 his prior assessments.

17²² *See id.* at 20.

18²³ The alleged onset date was later amended to January 7, 2009. *See AR* at 55.

19²⁴ The period after June 2010 is not at issue in this appeal, as Davis has been found medically
20 disabled and receives Title XVI disability benefits. Davis instead claims disability benefits under
21 Title II, which requires him to show disability prior to the date he was last insured for disability
insurance benefits under Title II.

22²⁵ *See AR* at 20.

23²⁶ *See id.* at 24.

24²⁷ *See id.* at 420–24.

25²⁸ *See id.* at 24.

26²⁹ *See id.*

A. Hearing

The hearing took place on July 25, 2012.³⁰ Davis appeared with his counsel and testified about his past work experiences, the circumstances of his injuries and the difficulties they create in his daily life.³¹ He described chronic and acute knee, back and shoulder pain³² that prevented him from sleeping or working, as well as a constant ringing in his ears.³³ He also testified that he could walk less than one block, lift less than five pounds and that he needed assistance to perform some routine tasks, such as chores.³⁴

Vocational Expert Ronald Morrell testified that Davis' previous work primarily required medium to very heavy physical demands.³⁵ He stated that Davis could have found light employment under the limitations set out in the treatment reports from 2008–2010, but that no jobs were available if Davis was subject to the more restrictive limitations of Abeles' June 2010 physical capacities statement.³⁶

In addition to the live testimony, Davis offered several pieces of written evidence at the hearing. First, he introduced a July 24, 2012 letter from his friend, Winfred Williams, stating that Davis suffered from constant pain in his shoulder, back and knees.³⁷ The letter also noted that Davis was unable to sit or stand for long due to his pain and that he complained of ringing in his

³⁰ See *id.* at 51.

³¹ See *id.* at 58–60.

³² See *id.* at 60.

³³ See *id.* at 63–66.

³⁴ See *id.* at 61–63, 76–78.

35 *Sacid et al.*

36 *S* : 1-82-87

37 *Geodesia* 2000, 23(1)

1 ears.³⁸ Williams also pointed out that she occasionally drove Davis from Palo Alto to San Pablo or
2 Richmond.³⁹

3 Second, Davis offered another letter from his acquaintance, Devorah Ginden, describing
4 him as in constant pain from his work injury.⁴⁰ That letter was written on the day of the hearing.⁴¹
5 Finally, Davis introduced physical therapy records from Abeles dated between April 27, 2010 and
6 June 2, 2010.⁴² These records documented treatments for Davis' knees, back, and shoulder
7 injuries.⁴³ At the hearing, the ALJ indicated that he would accept these written exhibits into
8 evidence, but the latter two pieces never made it in.⁴⁴ The ALJ took the case under submission.

9 **B. ALJ's Findings**

10 The ALJ issued his decision on August 2, 2012. At the first step of the disability analysis,
11 the ALJ found that Davis had not been engaged in substantial gainful employment from the alleged
12 onset date through the date last insured.⁴⁵ At step two, he found that Davis' right shoulder injury,
13 with partial tears of tendons with tendinosis, qualified as severe impairment per 20 C.F.R. §
14 404.1520(c).⁴⁶ The ALJ further found that Davis' claimed back conditions were not severe and

16 ³⁸ *See id.*

17 ³⁹ *See id.*

18 ⁴⁰ *See Docket No. 15 Exhibit B.*

19 ⁴¹ *See id.*

20 ⁴² *See Docket No. 15 Exhibit A.*

21 ⁴³ *See Docket No. 15 at 3.*

22 ⁴⁴ *See AR at 54.* The ALJ stated "the two documents [the Ginden letter and the physical therapy
23 records] that Counsel brought with her, I will order those admitted into evidence and the staff will
24 assign the next exhibit numbers in order in whatever appropriate sections." These two documents
25 are absent from the administrative record.

26 ⁴⁵ *See id. at 22.*

27 ⁴⁶ *See id.*

1 that no medical evidence in the record supported Davis' assertion that he heard voices.⁴⁷ At step
2 three, the ALJ found Davis' combined impairments did not meet or medically equal any of the
3 listed impairments.⁴⁸ At step four, he found that, through the date last insured, Davis had the
4 residual functional capacity to perform light work as defined in 20 C.F.R. § 404.1567(b) with the
5 following limitations: occasional overhead reaching with the left extremity; climbing ramps and
6 stairs no more than occasionally; crawling no more than occasionally; not climbing ladders, ropes
7 and scaffolds and not performing jobs requiring fine hearing capability or frequent verbal and
8 telephone communications.⁴⁹

9 In making his residual functional capacity determination, the ALJ largely discounted the
10 restrictions of Abeles' 2010 statement, noting that the severe limitations contained in the report
11 were inconsistent with objective medical evidence contained in Abeles' worker's compensation
12 treatment records.⁵⁰ Based on these contradictions, the ALJ accorded little weight to the opinion of
13 Abeles and instead relied primarily upon the worker's compensation records.⁵¹ The ALJ also
14 considered the opinion of Jaituni, the evaluating agency physician, who concluded that Davis could
15 perform medium-level work.⁵²

16 The ALJ also found Davis' testimony at the hearing only partially credible.⁵³ Specifically,
17 he noted that Davis complained of pain but that the objective medical records showed no acute
18 findings.⁵⁴ The ALJ also pointed out that during his testimony, Davis claimed pain at eight or nine

19 ⁴⁷ See *id.*

20 ⁴⁸ See *id.* at 23.

21 ⁴⁹ See *id.*

22 ⁵⁰ See AR at 322–410.

23 ⁵¹ See *id.*

24 ⁵² See *id.* at 25–26.

25 ⁵³ See *id.* at 26.

26 ⁵⁴ See *id.*

1 on a ten-point scale, yet made it through the hearing without wailing or grimacing.⁵⁵ Similarly, the
 2 ALJ noted that Davis claimed that his pain made it impossible for him to sit still for more than five
 3 to ten minutes, yet he was able to sit through an hour-long hearing without any notable
 4 discomfort.⁵⁶ For these reasons, the ALJ credited Davis' testimony regarding the existence of pain,
 5 but discredited it with respect to the severity of the pain.⁵⁷

6 The ALJ likewise found the Williams letter only partially credible on the basis that the
 7 subjective observations of a layperson could not outweigh countervailing medical evidence,⁵⁸ that
 8 Williams' statements could not be objectively verified and that Williams' reports regarding Davis'
 9 inability to sit or stand for long periods of time were inconsistent with her reports that he could sit
 10 in her car for an hour or more.⁵⁹

11 Finally, at step five, the ALJ determined that Davis was unable to perform any past relevant
 12 work through the date last insured.⁶⁰ However, because he determined from the vocational expert's
 13 testimony that jobs existed in the national economy that Davis could have performed through the
 14 date last insured, the ALJ determined that Davis did not qualify for disability benefits.⁶¹

15 C. Request for Appeals Council Hearing

16 Following the ALJ's finding of no disability, Davis requested a hearing before the Social
 17 Security Appeals Council.⁶² Davis submitted an additional letter from Abeles to the Appeals

18 ⁵⁵ See *id.*

19 ⁵⁶ See *id.*

20 ⁵⁷ See *id.*

21 ⁵⁸ See *Molina v. Astrue*, 674 F.3d 1104, at 1111 (9th Cir. 2012) (stating that ALJ may discount
 22 testimony from non-medical sources if the ALJ gives reasons germane to each witness for doing
 23 so).

24 ⁵⁹ See AR at 239.

25 ⁶⁰ See *id.* at 27.

26 ⁶¹ See *id.*

27 ⁶² See *id.* at 15.

1 Council. The letter, dated October 2, 2012, provided a diagnosis of Davis' shoulder, back and knee
2 problems and stated Abeles' belief that Davis was fully disabled.⁶³ The cover page of the letter
3 bears the inscription "6/17/2008 – 10/2/2012."⁶⁴ The Appeals Council rejected this letter because
4 it was written after the date last insured of June 30, 2010.⁶⁵ The Appeals Council also declined to
5 reverse the ALJ's decision, and this request for review followed.⁶⁶

6 II. LEGAL STANDARDS

7 A. Standard for Reviewing the Commissioner's Decision

8 Pursuant to 42 U.S.C. § 405(g), this court has the authority to review the Commissioner's
9 decision denying Davis benefits. The Commissioner's decision (here the underlying decision of
10 the ALJ) will be disturbed only if it is not supported by substantial evidence or if it is based upon
11 the application of improper legal standards.⁶⁷ In this context, the term "substantial evidence"
12 means "more than a scintilla but less than a preponderance – it is such relevant evidence a
13 reasonable mind might accept as adequate to support the conclusion."⁶⁸ When determining
14 whether substantial evidence exists to support the administrative record as a whole, the court must
15 consider adverse as well as supporting evidence.⁶⁹ Where evidence exists to support more than one
16 rational interpretation, the court must defer to the decision of the ALJ.⁷⁰ "If additional proceedings

17
18

⁶³ See Docket. No. 15 Exhibit C at 2–4.

19
⁶⁴ See *id.* at 1.

20
⁶⁵ See AR at 2.

21
⁶⁶ See *id.* at 1–6.

22
⁶⁷ See *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*, 966 F.2d 1255,
23 1257 (9th Cir. 1992).

24
⁶⁸ See *Moncada*, 60 F.3d at 523; *Drouin*, 966 F.2d at 1257.

25
⁶⁹ See *Drouin*, 966 F.2d at 1257; *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989).

26
⁷⁰ See *Moncada*, 60 F.3d at 523; *Drouin*, 966 F.2d at 1258.

1 can remedy defects in the original administrative proceedings, a social security case should be
 2 remanded.”⁷¹

3 **B. Standard for Determining Disability**

4 Disability claims are evaluated using a five-step, sequential evaluation process. In the first
 5 step, the Commissioner must determine whether the claimant currently is engaged in substantial
 6 gainful activity; if so, the claimant is not disabled and the claim is denied.⁷² If the claimant is not
 7 currently engaged in substantial gainful activity, the second step requires the Commissioner to
 8 determine whether the claimant has a “severe” impairment or combination of impairments that
 9 significantly limits the claimant’s ability to do basic work activities; if not, a finding of “not
 10 disabled” is made and the claim is denied.⁷³ If the claimant has a “severe” impairment or
 11 combination of impairments, the third step requires the Commissioner to determine whether the
 12 impairment or combination of impairments meets or equals an impairment in the Listing; if so,
 13 disability is conclusively presumed and benefits are awarded.⁷⁴ If the claimant’s impairment or
 14 combination of impairments does not meet or equal an impairment in the Listing, the fourth step
 15 requires the Commissioner to determine whether the claimant has sufficient “residual functional
 16 capacity”⁷⁵ to perform his or her past work; if so, the claimant is not disabled and the claim is
 17 denied.⁷⁶ The claimant has the burden of proving that he or she is unable to perform past relevant
 18 work.⁷⁷ If the claimant meets this burden, a *prima facie* case of disability is established. The

19

 71 *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981).

20 72 *See id.*

21 73 *Id.*

22 74 *See id.*

23 75 A claimant’s RFC is what he or she can still do despite existing exertional and nonexertional
 24 limitations. *See Cooper v. Sullivan*, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

25 76 *See Drouin*, 966 F.2d at 1257; *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984).

26 77 *See id.*

1 Commissioner then bears the burden of establishing that the claimant can perform other substantial
2 gainful work;⁷⁸ the determination of this issue comprises the fifth and final step in the sequential
3 analysis.

4 **III. DISCUSSION**

5 Davis argues that the ALJ erred in his ultimate finding that Davis was not “disabled” as
6 defined by the Social Security Act, 42 U.S.C. § 401 *et seq*, and thus was ineligible for disability
7 insurance benefits. He raises five specific challenges to the ALJ’s decision: (1) the ALJ erred in
8 rejecting Abeles’ opinion; (2) the ALJ erred in rejecting Davis’ testimony without a proper
9 credibility finding; (3) the ALJ erred in discounting the Williams letter; (4) the ALJ erred in failing
10 to include timely submitted evidence in the record and (5) the ALJ erred in failing to properly
11 question the vocational expert.⁷⁹ In addition, Davis argues that the Social Security Appeals
12 Council erred in rejecting Abeles’ October 2012 letter.⁸⁰

13 The Commissioner counters that the ALJ’s decision was based on substantial evidence and
14 is free from harmful legal error.⁸¹

15 The court will address each challenge in turn. As described in greater detail below, the
16 Commissioner has the better of each point.

17 **A. The ALJ’s Rejection of Abeles’ Opinion Was Appropriate**

18 Davis claims that the ALJ erred in discounting the opinion of Abeles – a treating physician
19 – because he (1) failed to address several limitations in Abeles’ statement on how Davis’ pain
20

21 ⁷⁸ There are two ways for the Commissioner to meet the burden of showing that there is work in
22 significant numbers in the national economy that claimant can do: (1) by the testimony of a
23 vocational expert or (2) by reference to the Medical-Vocational Guidelines. *See Tackett v. Apfel*,
180 F.3d 1094, 1099 (9th Cir. 1999).

24 ⁷⁹ *See* Docket No. 15 at 2.

25 ⁸⁰ *See id.*

26 ⁸¹ *See* Docket No. 19 at 6.

1 would prevent him from working,⁸² (2) did not fully address the limitations proposed by Abeles
 2 regarding handling, reaching, and fingering⁸³ and (3) gave improper weight to “objective” medical
 3 evidence in discrediting Abeles’ opinion.⁸⁴

4 An ALJ may only discount the opinion of a treating physician if he can provide clear and
 5 convincing reasons for the rejection.⁸⁵ If the treating physician’s opinion is contradicted by
 6 another doctor, the ALJ may discount the treating physician’s opinion based upon specific and
 7 legitimate reasons supported by substantial evidence in the record.⁸⁶ In doing so, “[t]he ALJ must
 8 do more than offer his own conclusions. He must set forth his own interpretations and explain why
 9 they, rather than the doctors’, are correct.”⁸⁷ The ALJ may also discount statements by a physician
 10 that are unsupported by objective medical evidence.⁸⁸

11 Here, although the ALJ did not articulate each piece of Abeles’ opinion that he discredited,
 12 he did provide clear and convincing reasons for his conclusion that the whole of Abeles’ physical
 13 capacities statement was unpersuasive: “throughout the record, Abeles concludes that the claimant
 14 can perform modified work with minimal restrictions . . . but concludes in his physical capacities
 15 statement that the claimant can perform little-to-no work at all.”⁸⁹ This is far more than a mere
 16 conclusory statement that the treating physician was wrong. It is a demonstration of a fundamental
 17 internal inconsistency in the physician’s assessment. The ALJ also set forth his own interpretation

18 ⁸² See Docket No. 15 at 11.

19 ⁸³ See *id.* at 12.

20 ⁸⁴ See *id.* at 13.

21 ⁸⁵ See *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995).

22 ⁸⁶ See *id.*

23 ⁸⁷ *Embrey v. Bowen*, 849 F.2d 418, 421–22 (9th Cir. 1988).

24 ⁸⁸ See *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (“an ALJ need not accept a
 25 treating physician’s opinion that is conclusory and brief and unsupported by clinical findings”).

26 ⁸⁹ See AR at 26.

1 of the medical evidence: the objective treatment records, as supported by the opinion of the agency
2 evaluating physician, found no acute medical problems that would limit Davis from performing
3 light work during the period in question.⁹⁰ The ALJ's interpretation of this medical evidence was
4 thus rationally drawn from objective data in the record, and this court declines to overturn it on
5 review.⁹¹

6 **B. The ALJ's Finding Davis' Testimony Not Credible Was Appropriate**

7 Davis next argues that the ALJ erred in discounting his testimony of chronic, acute pain
8 without making a proper credibility finding.⁹² In deciding whether to accept a claimant's
9 subjective testimony about pain and other symptoms, the ALJ must engage in a two-step analysis.⁹³
10 The claimant must first produce objective evidence of an underlying impairment that could
11 reasonably be expected to produce the pain or other symptoms alleged.⁹⁴ With such evidence in
12 place, the ALJ may only reject claimant's testimony by making specific findings giving clear and
13 convincing reasons for doing so.⁹⁵ These findings must be properly supported by the record and
14 sufficiently specific to demonstrate that the ALJ did not arbitrarily discredit a claimant's subjective
15 testimony.⁹⁶ If the ALJ's findings are supported by substantial evidence, then the court may not
16 engage in second-guessing as to his credibility findings.⁹⁷

17
18

⁹⁰ *See id.*

19⁹¹ *See Moncada*, 60 F.3d at 523.

20⁹² *See id.* at 15.

21⁹³ *See Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).

22⁹⁴ *See id.*

23⁹⁵ *See id.* at 1284.

24⁹⁶ *See Thomas v. Barnhart*, 278 F.3d 957, 958–959 (9th Cir. 2002).

25⁹⁷ *See id.* at 959. Although evidence of a claimant's activities may support an interpretation more
26 favorable to the claimant, the ALJ's decision must be upheld where the evidence is subject to more
27 than one rational interpretation. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). An

1 In this case, the ALJ's credibility findings rationally support the conclusion that Davis' 2 subjective allegations of severe pain were only partially credible. He specifically noted that the 3 medical record did not indicate acute, persistent pain and that Davis exhibited an apparent lack of 4 physical discomfort except for one vague statement in an hour-long hearing.⁹⁸ These are 5 sufficiently specific, substantial reasons for rejecting Davis' testimony, such that it is clear that he 6 was not arbitrarily rejecting Davis' subjective claims. The court thus declines to second-guess the 7 ALJ's credibility determination.

8 **C. The ALJ's Credibility Determination on the Williams Letter Was Appropriate**

9 Davis next argues that the ALJ erred in discounting the Williams letter because it was not 10 consistent with the medical evidence or objectively verifiable.⁹⁹ The ALJ is permitted to determine 11 the credibility of witnesses.¹⁰⁰ "If the ALJ wishes to discount the testimony of the lay witnesses, 12 he must give reasons that are germane to each witness."¹⁰¹

13 The ALJ properly considered Williams' testimony and gave clear reasons for why he found 14 it less than credible: it conflicted with the objective medical records and could not be verified with 15 any reasonable degree of certainty.¹⁰² He did not wholly discount this statement; he merely gave it

17 ALJ may also use ordinary techniques of credibility evaluation, including observations of a 18 claimant's demeanor at a hearing. *See Thomas*, 278 F.3d at 960.

19 ⁹⁸ *See* AR at 64.

20 ⁹⁹ *See* Docket No. 15 at 17.

21 ¹⁰⁰ *See Molina*, 674 F.3d at 1121–1122.

22 ¹⁰¹ *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). However, "if an ALJ has provided well- 23 supported grounds for rejecting testimony regarding specified limitations, [the court] cannot ignore 24 the ALJ's reasoning and reverse the agency merely because the ALJ did not expressly discredit 25 each witness who described similar limitations." *See Molina*, 674 F.3d at 1121. Similarly, if lay 26 witness testimony describes the same limitations as the claimant's already-rejected testimony, the 27 ALJ's rejection of the witness testimony without comment is harmless error. *See Shuey v. Astrue*, 480 Fed. App'x. 439, 441 (9th Cir. 2012).

28 ¹⁰² *See* AR at 26.

1 less weight than the other evidence available in the record.¹⁰³ Consequently, the ALJ did not err in
 2 discounting the Williams letter.

3 **D. The ALJ's Exclusion of the Ginden Letter and Therapy Records Was Harmless**

4 Both parties agree that the ALJ's failure to add the Ginden letter and the 2010 physical
 5 therapy reports to the administrative record was an error.¹⁰⁴ However, this error was harmless and
 6 thus does not warrant remand.¹⁰⁵

7 Under Ninth Circuit law, "a district court's erroneous exclusion of evidence does not
 8 warrant reversal unless the error 'more probably than not tainted the verdict,'"¹⁰⁶ and this standard
 9 also applies to review of administrative decisions.¹⁰⁷

10 **1. Omission of the Ginden Letter Was Harmless Error**

11 The Ginden letter stated limitations similar to the Williams letter, noting that Davis suffers
 12 from chronic shoulder, back, and knee pain.¹⁰⁸

13 The ALJ provided well-supported grounds for discrediting the Williams letter in light of the
 14 available objective medical evidence. Because the Ginden letter recites the same limitations as the
 15 Williams letter, the exclusion of the Ginden letter from the record more probably than not did not
 16 taint the ALJ's decision, and "we cannot ignore the ALJ's reasoning and reverse the agency merely
 17 because the ALJ did not expressly discredit each witness who described the same limitations."¹⁰⁹

18¹⁰³ *See id.*

19¹⁰⁴ *See Docket No. 15 at 2; Docket No. 19 at 8, 13.*

20¹⁰⁵ *See Shinseki v. Saunders*, 556 U.S. 396, 409 (2009).

21¹⁰⁶ *Molina*, 674 F.3d 1119 (quoting *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1009 (9th Cir.
 22 2007)), *aff'd* 553 U.S. 591 (2008).

23¹⁰⁷ *See Molina*, 674 F.3d at 1120–21.

24¹⁰⁸ *See Docket No. 15 Exhibit B.*

25¹⁰⁹ *Molina*, 674 F.3d at 1121; *see also Shuey v. Astrue*, 480 Fed. App'x 439, 441 (9th Cir. 2012)
 26 (holding that ALJ's failure to consider lay witness statement was harmless error because ALJ had
 27 already discounted a statement reciting similar limitations).

2. Omission of the Physical Therapy Records Was Harmless Error

Davis claims that the excluded physical therapy reports from Abeles' clinic demonstrate that he had ongoing problems with his knees, back and right shoulder, and that examination of those records would have caused the ALJ to have given greater credibility to Abeles' physical capacities statement and thus a different ruling.¹¹⁰ The court again looks to the record as a whole and asks whether the error more probably than not tainted the decision. The excluded physical therapy records document Davis' subjective complaints of pain, an almost full range of motion in the back and knees and a restricted range of motion in the right shoulder with strength assessed at four out of five.¹¹¹ They are largely consistent with the objective medical reports considered by the ALJ from June 2008 to October 2010, and as such they would not add anything new to the record.¹¹² Instead, they are consistent with the ALJ's finding, from the available objective medical evidence, that Davis was capable of light work with restrictions on overhead reaching with the right arm. Because these records are in accord with the ALJ's finding, they more probably than not would not have affected the ALJ's ultimate determination. The omission of this evidence from the record is therefore harmless error.

E. The ALJ's Hypothetical Question to the Vocational Expert Was Appropriate

Davis contends that the ALJ erred because (1) the hypothetical that he posed to the vocational expert did not encompass all functional limitations supported by the evidence and (2) the ALJ did not ask the vocational expert whether there was a conflict between his testimony and the Dictionary of Occupational Titles as required by SSR 00-4p.¹¹³

As discussed, the ALJ properly determined Davis' limitations. The hypothetical thus reflected the appropriate limitations and was free from error. And the first question that the ALJ asked the vocational expert was "Mr. Morrell, will your testimony be consistent with the

¹¹⁰ See Docket No. 15 at 7.

¹¹¹ See Docket No. 15 Ex. C.

¹¹² See AR at 24–26.

Dictionary of Occupational Titles, unless you tell us otherwise?" to which the vocational expert responded in the affirmative.¹¹⁴ As such, Davis' argument on this point is unsupported by the record.

F. The Appeals Council Appropriately Rejected the October 2012 Abeles Letter

Finally, Davis argues that the Appeals Council erred in rejecting Abeles' October 2012 letter and claims that it addressed a period of time prior to the date last insured.¹¹⁵ However, this characterization does not appear anywhere in the letter, nor does it contain any statement indicating that Abeles intended to correct or otherwise reframe his conclusions regarding the 2009 MRI results. Consequently, the Appeals Council's interpretation of the letter as addressing the time period after the last insured date was grounded in rational analysis of the letter's content. The court declines to reverse that finding merely because Davis has introduced a competing interpretation of that content.¹¹⁶

IV. CONCLUSION

Davis' motion for summary judgment or remand is DENIED and the Commissioner's cross-motion for summary judgment is GRANTED. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: July 22, 2014

Paul S. Aenel

PAUL S. GREWAL
United States Magistrate Judge

¹¹³ See Docket No. 15 at 18.

¹¹⁴ See AR at 80–81.

¹¹⁵ See Docket No. 15 at 9.

¹¹⁶ See *Moncada*, 60 F.3d at 523 (upholding agency decisions where the evidence is subject to more than one rational interpretation).